



August 25, 2003

Mr. David Kaiser
Federal Consistency Coordinator
Coastal Programs Division
Office of Ocean and Coastal Resource Management
NOAA
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

**RE: Coastal Zone Management Act Federal Consistency Regulations;
Docket No. 030604145-3145-01**

Dear Mr. Kaiser:

Pursuant to the proposed rule issued in the referenced proceeding on June 11, 2003,¹ the Interstate Natural Gas Association of America (INGAA) submits the following comments on the National Oceanic and Atmospheric Administration's (NOAA) proposal to revise the Federal Consistency regulations promulgated under the Coastal Zone Management Act of 1972 (CZMA).

INGAA is a trade organization that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate natural gas transmission pipeline companies operating in the United States, as well as comparable companies in Canada and Mexico. Its members transport over 95 percent of the nation's natural gas through a network of 180,000 miles of pipelines. Interstate natural gas pipelines are certificated by the Federal Energy Regulatory Commission (FERC) under section 7(c) of the Natural Gas Act (NGA).

On June 11, 2003, NOAA issued a proposed rulemaking to "make improvements to the Federal Consistency regulations to clarify some sections and *provide transparency and predictability to the Federal Consistency regulations*" (emphasis added). This rulemaking, in

¹ 68 Fed. Reg. 34851 (June 11, 2003).

part, responds to Vice President Cheney's May 2001 National Energy Policy Report to the President (Energy Report), which specifically recommended that the President direct the Secretary of Commerce to reexamine current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding siting of energy facilities in the coastal zone.

The preamble to the proposed rule focuses on how the Federal Consistency regulations affect oil and gas lease sales. While this focus is understandable in view of the Energy Report's specific mention of the Outer Continental Shelf Lands Act in connection with the CZMA, it still is remarkable that the preamble fails even to acknowledge the growing conflict between NOAA's interpretation of its CZMA authority and the FERC's authority under the NGA to issue certificates of public convenience and necessity for interstate natural gas pipelines. This omission is particularly glaring given that appeals to NOAA by two interstate pipelines from state objections to consistency certifications were pending when the proposed rule was issued.²

Some of the proposed changes to NOAA's regulations represent incremental improvements over the current rules affecting interstate pipelines and, as will be detailed herein, INGAA supports these modifications. Still, NOAA's failure to acknowledge and address the larger conflict means that, with respect to interstate pipeline construction, the rulemaking will not achieve its stated goal of providing "transparency and predictability to the Federal Consistency regulations."

The NGA, which predates the CZMA by decades, confers on FERC plenary authority to issue certificates of public convenience and necessity authorize the siting, construction and operation of interstate natural gas pipelines. The Congress in 1972 made clear that enactment of the CZMA did not diminish, modify or supercede this preexisting federal authority. Now, however, the pending appeals from state objections to consistency certifications for proposed interstate pipelines that have received FERC certificates calls into question whether this clear statement by the Congress will be followed. INGAA urges NOAA in its final rule to state clearly that it will give due weight to FERC's findings in view of the statutory scheme in the NGA that confers on FERC sole responsibility for determining whether, and under what conditions, a proposed interstate pipeline is required by the public convenience and necessity³

A final rule in this proceeding will be legally deficient should it not address the specific legal issues and practical circumstances surrounding NOAA's administration of the CZMA and interstate natural gas pipelines that receive FERC certificates under the NGA. In the alternative, should NOAA not address these issues in the final rule, INGAA requests that NOAA initiate a separate, new rulemaking focused on these issues. In particular, such a rulemaking should propose amending NOAA's Consistency Regulations to: (1) require as a condition for approval of a state Coastal Management Program that the state participate in FERC's National Environmental Policy Act (NEPA) review process for a pipeline certificate application to ensure that the FERC has an opportunity to address the state's concerns as part of that process; and (2) adopt the record of the FERC certificate proceeding as the record for any appeal from a state's

²Millennium Pipeline Company and Islander East Pipeline Company, L.L.C.

³ See ERC Comments on Millennium Consistency Appeal, November 15, 2002, at page 2.

objection to a pipeline applicant's consistency certification in order to avoid the delays and legal infirmities associated with relitigating FERC's determination of issues reserved solely to FERC under the NGA.

INGAA submits that the proposed rule is legally deficient due to NOAA's mischaracterization of its legal authority under the CZMA as it applies to interstate natural gas pipeline projects that have been authorized by the FERC pursuant to the NGA.

The Federal Consistency Process Does Not Affect a Waiver of FERC's Plenary NGA Authority.

NOAA asserts that Federal Consistency is a "limited waiver of Federal Supremacy and authority" (68 Fed. Reg. 34852, June 11, 2003). The Congress in the NGA, however, conferred on the FERC plenary authority to authorize the construction of interstate natural gas pipelines. NGA Section 1(a) states unequivocally that transportation for ultimate distribution to the public is "affected with a public interest", and that Federal regulation in matters relating to transportation in interstate commerce "is necessary in the public interest". Numerous Supreme Court decisions validate the preemptive effect of FERC's authority under the NGA.⁴ By contrast, Congress limited CZMA's construction with other statutes not to "diminish either federal or state jurisdiction..." 16 USC Sec. 1456(e).

NOAA's and/or Delegated State Authority's Consideration of Alternatives Subverts the Comprehensive Scheme for Interstate Natural Gas Pipeline Authorization Under the NGA.

The NGA and NEPA require FERC to assess all reasonable alternatives to a pipeline's construction proposal as a key factor in its evaluation and determination. Yet NOAA asserts that it must review alternatives that the protesting coastal state, *in that state's judgment*, deems consistent with its state coastal management plan. (68 Fed. Reg. 34858). This subverts the comprehensive federal scheme Congress intended for interstate pipeline analysis.

State consideration of issues not already covered in the FERC's Environmental Impact Statement (EIS) should, at the very least, be done within the FERC-imposed deadline for State agency comments. This would continue to allow for full State participation, while protecting federal authority to authorize interstate natural gas pipeline construction pursuant to the NGA.

The Scope of Appellate Review Under the CZMA is Limited.

NOAA asserts that it has *de novo* review authority (68 Fed. Reg. 34859) pursuant to the CZMA, without citation to the statute. Absent an express statutory grant of authority for *de novo* review, however, NOAA's authority under CZMA is appellate only. 16 USC Sec. 1456(c)(3)(a). It is black letter law that an "appeal" is an examination by the appropriate review body of a decision record to determine if there are material errors of fact or application of law contained in

⁴See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply Corp. v Public Service Commission of the State of New York*, 894 F.2d 571 (2nd Cir.), *cert. denied*, 497 U.S. 1004 (1990).

that record. Therefore, NOAA lacks the authority to engage in a *de novo* review of the interstate pipeline routing alternatives considered by the FERC in the NGA certificate process.

NOAA in the preamble attempts to clarify its use of the term *de novo* review:

The Secretary's review is *de novo*, to determine if the project is consistent with the CZMA or in the interest of national security. It is not a review of the basis for the State's objection or the basis for issuing the Federal agency authorization. The Secretary does not substitute the Secretary's judgement [sic] for that of the authorizing Federal agency regarding the merits of the project, nor does the Secretary determine whether a proposed project complies with other Federal law. (68 Fed. Reg. 34863).

While INGAA does not object to this particular characterization of review authority under the CZMA, the statement fails to address the fact that in considering alternative routes for an interstate pipeline that has been certificated by the FERC, NOAA is engaging in what amounts to the very form of *de novo* review that it disclaims in the cited statement.

NOAA also asserts that "*through the CZMA Congress gave the States the ability to review federal actions, independent of the Federal agencies' reviews.*" (68 Fed. Reg. 34860) (emphasis added). This statement, however, is inconsistent with the fact that the CZMA limits NOAA's consistency review of a federal permit activity to an examination of whether the proposed activity is *consistent to the maximum extent practicable* with the *enforceable policies* of a state's coastal zone management plan. A state policy in its coastal zone management plan that has the effect of blocking the siting of an interstate pipeline could not be enforceable against a federally pre-emptive NGA.

A Final Rule That Fails to Address the Conflict Between NOAA's Interpretation of its CZMA Authority and The NGA Would Not be Reasoned Decisionmaking.

NOAA asserts that its regulations are designed to provide "reliable procedures and predictability" to the implementation of Federal consistency. (68 Fed.Reg. 34851-52). In the case of interstate gas pipeline construction, NOAA's procedures throw into complete disarray FERC's long-standing procedures for its analysis and determination under the NGA, NEPA, and the Administrative Procedure Act, and materially diminish the predictability of FERC's preemptive certificate determinations.

Comments on the Proposed Rule

INGAA appreciates NOAA's proposals to improve its Consistency Regulations by specifying deadlines for action by the states and by NOAA itself. Still, INGAA suggests that, at least within the context of interstate pipeline projects that are subject to the FERC certificate process under the NGA, even more expedited regulations can be adopted.

In particular, proposed section 930.130 states that one of the three circumstances when the 270-day period for closing the decision record can be stayed is when the Secretary needs

additional NEPA and/or ESA documents. This exception makes little sense in the case of an appeal that has been filed following the FERC's issuance of a certificate of public convenience and necessity for an interstate pipeline. The record of the certificate proceeding will include all necessary NEPA and/or Endangered Species Act documents; therefore, there is no need for a stay in this instance.

In fact, given the comprehensive nature of the record in a FERC certificate proceeding, it can be asked validly whether, in this context, there is the need for NOAA to develop a separate record for purposes of the appeal. The FERC record will address the two threshold questions that are relevant in the Secretarial review process under the CZMA: whether the proposed activity is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.

With regard to this second criteria, NOAA's regulations at section 930.121 require that an activity must "significantly or substantially" further the national interest before the Secretary can override an objection based on the statutory "national interest" criteria. INGAA submits that FERC's issuance of a certificate of public convenience and necessity for an interstate pipeline should by definition be deemed to meet the criteria that an activity significantly and substantially furthers the national interest. A FERC certificate confers on its holder the ability to exercise a federal right of eminent domain. The fact that the Congress in the NGA saw fit to confer this right on a private applicant acting pursuant to a federal authorization speaks volumes about the national interest furthered by interstate pipeline projects with FERC certificates.

Finally, given the comprehensive nature of the record in the FERC certificate proceeding, INGAA questions whether the 270-day record closing period and the 90-day period for decision are necessary in this context. Together, these two periods total close to a full year, when all that is really needed is a period for briefing and for NOAA to deliberate on the briefs and the record that already is complete as a result of the FERC certificate process. INGAA requests that, in cases where the FERC certificate already has been issued when an appeal is filed, the combined period be reduced to 120 days. That is, 30 days for briefing and 90 days for deliberation.

Thank you in advance for your consideration of INGAA's comments.

Donald F. Santa, Jr.
President

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